91450-8

SUPREME COURT
OF THE STATE OF WASHINGTON

CASE NO.

STATE OF WASHINGTON, RESPONDENT

V.

ANATOLIY MELNIK, PETITIONER

PETITION FOR REVIEW TO THE SUPREME COURT

APPEALING COURT OF APPEALS, DIVISION III
CASE NO. 31347-0-III

APPEAL FROM THE SUPERIOR COURT
OF BENTON COUNTY

SUPERIOR COURT CASE NO.
13-1-00103-3

PETITIONER PRO SE,

Anatoliy Melnik, Doc # 388727
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Connell, WA. 99326

ORIGINAL

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RULES OF APPELLATE PROCEDURE

I. IDENTITY OF PETITIONER

1.1 COMES NOW THE Petitioner, Anatoliy Melnik, Pro Se, and pursuant to RAP 13.4(d), asks this court to accept review of the decisions designated in part II of this petition.

II. DECISIONS

2.1 Peitioner asks this court to accept review of the decisions made in the unpublished opinion by the Honorable Juddge Korsmo, J., Judge Siddoway, C.J., and Judge Fearing, J., in relation to the Court of Appeals, Division III, Case No. 31847-8-III, affirming the convictions against the appellant in the Superior Court of Benton County, Case No. 13-1-00108-3 to two counts of traficking in stolen property in the first degree.

III. ISSUES PRESENTED FOR REVIEW

3.1 Did the court of appeals err in affirming the convictions of two counts of trafficking in stolen property in the first degree when the evidence was insufficient to support the conviction?

3.2 Did the court of appeals err in finding no merit to the appellants argument to the improper jury instruction 14, which consequently shifted burden of proof to the defendant, and thereby violating his Sixth Amendment to the U.S. Constitution of his right to a fair trial?

3.3 Did the court of appeals err in affirming the appellants exceptional sentence imposed by the Benton County Superior Court, in the absence of a jury finding of aggravating factors, more commonly known as a Blakely violation?

3.4 Did the search warrant violate Mr. Melniks constitutional rights, and was it overbroad and found without probable cause as there was no nexus between the defendant and the original crime of residential burglary, and

the seized perfume bottles should have never been permitted to be taken or submitted at trial?

3.5 Did the appellants attorney commit ineffective assistant of counsel by failing to object to jury instruction 14, and by failing to challenge the search warrant on the grounds of no probable cause, and the warrant was overbroad, and that the required nexus between the criminal activity and the item to be seized was not met?

IV. STATEMENT OF THE CASE

4.1 On January 13, 2013 the victam Tiffany Glassic came home from church to find her home had been burglarized. (RP 82) She called the police. (RP 92) She reported that numerous items had been stolen. (RP 89-92)

4.2 About 24 hours later, Anatoliy Melnik sold some property to a Money Tree Lender business, to wit, gold jewelry. (RP 172, 188-93).

4.3 On January 16 Mr. Melnik approached an employee at Ace Pawn for a price inquiry and verification to a loose diamond. (RP 155) The clerk became suspicious and notified the police of his suspicion. (RP 146) The pawnshop staff retained possession of the diamond. (RP 149).

4.4 Ultimately the state charged Mr. Melnik with two counts of trafficking in stolen property. (CP 1-2). Police detective John Davis testified that while Mr. Melnik was in jail he placed telephone calls to a female named Brooke. (RP 250) The detective listened to the conversations and told the jury that he heard Mr. Melnik describe in detail in finding a bag of jewelry in a park in Pasco. (RP 251) Mr. Melnik did not testify.

4.5 The state proposed, and the court gave a jury instruction relating

to a civil procedure for claiming found property. (RP 279-80)

4.6 During closing arguments the prosecuter suggested to the jury that, even if at the time he attempted to sell it, Mr. Melnik believed the jewelry had been lost, this would be sufficient evidence that he acted with knowledge that the property was stolen. (RP 287) The state further suggested that the theft means to appropriate lost or misdelivered property with intent to keep it from the owner, and the prosecuter pursuaded the jury to believe that this was a scenario that could have happened in this case. (RP 292)

4.7 In making that argument the state relied in part on the provisions of RCW 63.21.010, which is civil in nature, and was given as instruction 14 to the jury. (RP 301)

4.8 The jury found Mr. Melnik guilty on both counst. (CP 60-61) The court imposed exceptional concurrent sentences of 100 months for each count based on an offender score of ten. The top of the standard range for each offense was 63-84 months. (RP 64, 67) The aggravating factors for an exceptional sentence was found and imposed by a Benton County superior court judge, and not by a jury pursuant to the Blakely Rule.

4.9 Mr. Melnik timely filed an appeal to his two convictions of trafficking stolen property, under direct appeal, to the court of appeals, Div. III.

4.10 A ruling in the form of an unpublished opinion came down from that court on February 24, 2015 affirming the convictions.

4.11 Mr. Melnik, feeling himself aggrieved, and having standing to complain, timely files this petition for review to the Supreme Court of Washington State.

V. ARGUMENTS WHY REVIEW SHOULD BE ACCEPTED

EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION

5.1 A jury found Mr. Melnik guilty of two counts of trafficking in stolen property on evidence that the state presented which fell short in proving the essential elements of the crime.

5.2 The petitioner submits to this court that the key element in trafficking in stolen property according to statute is having knowledge the property was stolen.

5.3 RCW 9A.82.050(1) A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property, or who knowingly trafficks in stolen property, is guilty of trafficking in stolen property in the first degree.

5.4 Definition of Knowledge: 1) understanding gained by actual experience; 2) range of information <to the best of my->; 3) clear perception of truth; 4) something learned and kept in mind; 5) acquaintance with or underrstanding of a science, art, or technique. (WEBSTER'S ALL IN ONE DICTIONARY AND THESAURUS 2008 EDITION).

5.5 Definition of knowing: 1) having or reflecting knowledge, intelligence, or information; 2) shrewdly and keenly alert; 3) deliberate, intentional. (WEBSTERS ALL IN ONE).

5.6 Definition of knowingly: 1) In a knowing manner; with awareness, deliberateness, or intention. (WEBSTERS ALL IN ONE).

5.7 Knowledge that the property was stolen is a key element of the offense. State v. Killingsworth, 166 Wn. App. 283, @ 287-88, 269 P.3d 1064, 1067 (2012); Review denied, 174 Wn. 2d 1007, 278 P.3d 1112 (2012).

5.8 The appellant argues that this element was not proven beyond a reasonable doubt. There was no direct evidence linking Mr. Melnik to the burglary, and the circumstantial evidence that the state presented was wanting.

5.9 The summary of the circumstantial evidence is an Ace Pawn employee testified Mr. Melnik looked nervous when he attempted to get a diamond appraised. So the employee, Mr. Essery, without authority of law, witheld the property from Mr. Melnik, and decided to call the police on a mere assumption. At that time his testimoney was pure speculation and conjecture, and it should have never been permitted at trial.

5.10 The events leading up to this encounter entailed that Mr. Melnik found some jewelry in a park, sold gold at another place of business two days before this, and his attempt to get this diamond appraised falls short of the definition of trafficking in stolen property.

5.11 The evidence that Mr. Melnik never attempted to sell the diamond is found in Mr. Essery's testimoney. Q. "There wasn't actually an offer made by anybody on the sale, Diamond, correct?" A. "No. After Randy ran him he wasn't going to make an offer." Q. "And he didn't make an offer to you for purchase, did he?" A. "No he never told us what he wanted for it, no." (RP 164 ¶¶ 12-13).

5.13 RCW 9A.82.050 trafficking in stolen property is an alternative means crime. When alternative means of committing a single offense are presented to a jury, each alternative means must be supported by substantial evidence in order to safeguard a defendants right to a unanimous jury determination. State v. Smith, 159 Wn. 2d 778, 783, 154 P.3d 873 (2007); See State v. Sweany, 174 Wn. 2d 909, 914, 281 P.3d 305 (2012).

5.14 RCW 9A.82.050(1) describes two alternative means: "Knowingly (1) initiating, (2) organizing, (3) planning, (4) financing, (5) directing, (6) managing, or (7) supervising the theft of property for sale to others, or (8) knowingly trafficking in stolen property." State v. Lindsey, 177 Wn. App. 233, @ 241, 311 P.3d 61 (2013).

5.15 Mr. Melnik went into the pawnshop to find out if the diamond was real and at no time offered or accepted an offer for the diamond.

5.16 This does not meat the elements of trafficking in stolen property in the first degree in regards to the loose diamond, and the evidence is therefore insufficient to support the conviction.

5.17 In regards to the sale of gold to the Money Tree Lender, the petitioner argues that the key element that he knew the gold was stolen, was not proven beyond a reasonable doubt. This argument falls within the second alternative means of the statute RCW 9A.82.050(1)... "Knowingly trafficking in stolen property".

5.18 This is established in case law as well as statute. In State v. Killingsworth, 166 Wn. App. 283, @ 287-88, 269 P.3d 1064, 1067 (2012), that court ruled that to prove Killingswoth trafficked in stolen property, the state had to prove he knew the property he pawned was stolen, recognizing RCW 9A.82.050, RCW 9A.82.010(19); State v. Herman, 138 Wn. App. 596, 604, 158 P.3d 587 (1997); and State v. Michielli, Wn. 2d 229, 236, 937 P.2d 587 (1997) as the cases of precedent.

5.19 When determining the meaning of a statute, the courts fundamental objective is to ascertain and carry out the legislatures intent. In re Det.

of Danforth, 173 Wn. 2d 69, 67, 264 P.3d 793 (2011). The legislature is presumed to intend the plain meaning of its language. State v. Gidbson, 16 Wn. App. 119, 127, 553 P.2d 131 (1976). In determining the plain meaning of a provision, the court looks to the text of the statutory provision in question, as well as the context of the statute in which that provision is found, related provisions, and the statutory schema as a whole. State v. Ervin, 169 Wn. 2d 815, 820, 239 P.3d 354 (2010).

5.20 In the criminal cases, fairness dictates that statutes should be literally and strictly construed and that courts should refrain from using possible but strained interpretations. See State v. Bell, 83 Wn. 2d 383, 388, 518 P.2d 696 (1974).

5.21 At trial the state presented, and the court erroneously permitted, possible but strained interpretations of RCW 9A.82.050 (trafficking in stolen property) by not proving Mr. Melnik knowingly sold stolen property in regards to the gold, and in regards to the loose diamond, there was never ever a conversation about a purchase offer at the pawnshop. (RP 164).

5.22 More to the point, the Ace Pawn employee illegally seized the property, without authority of law, from Mr. Melnik and consequently violated his constitutional rights by witholding his property and checking his name through court registry for wants and warrants, and then subsequently calling the police on him on a mere hunch. (RP 146) This violated Mr. Melnik's Fourth Amendment to the U.S Constitution by illegal seizure without probable cause, and Article I, Section 7 of the Washington State Constitution of invasion of private affairs or home invaded.

5.23 A hunch alone does not warrant police intrusion into people's everyday lives. State v. Doughty, 170 Wn. 2d 57, 63, 239 P.3d 573 (2010). The employee's of Ace Pawnshop just went on a hunch, and the fruits of this ultimately lead to Mr. Melnik being arrested.

5.24 In light of the violations of Mr. Melnik's constitutional rights, and the states failure to prove beyond a reasonable doubt all the elements of trafficking in stolen property, Petitioner respectfully asks this court to accept review.

JURY INSTRUCTION 14

5.25 The petitioner submits the the state shifted the burden of proof upon the defendant when they admitted RCW 63.21.010, a civil lost property statute, as a jury instruction, and the court of appeals erred in not remanding for new trial.

5.26 An instruction that could reasonably be understood as shifting the burden of proof to the defendant on an element of the offense is unconstitutional. Francis v. Franklin, 471 U.S. 307, 313, 105 S. Ct. 1965, 1970, 85 L.Ed.2d 344 (1985); See state v. Hanna, 123 Wn. 2d 704, 710, 871 P.2d 135, 138 (1994).

5.27 Alleged errors of law in a trial courts jury instructions are reviewed de novo. State v. Porter, 150 Wn. 2d 732, 735, 82 P.3d 234 (2004).

5.28 The petitioner submitted this for the first time on appeal to the court of appeals under RAP 2.5(a)(3) as it was a manifest error of a constitoional magnitude.

5.29 In the court of appeals unpublished opinion they ruled that while

the relevancy of instruction 14 can be questioned, it did not impermissibly shift the burden of proof.

5.30 The Petitioner wholly disagrees. The State used instruction 14 in there closing arguments while never submitting any evidence to the statute during the evidence portion of the trial. But the prosecutor implied that Mr. Melnik was guilty because he did not comply with the civil lost property statute.

5.31 Prosecutor Ms. McRoberts, "... We have a statute that tells you very clearly if you find property, as the defendant stated in his phone calls, you have to do that. He didn't. Therefore he has stolen property..." (RP 319).

5.32 The petitioner argues that these closing arguments by the state did infact shift burden. You have a jury that is untrained in the law, not familiar with legal language, and a judge giving them a a jury instruction surrounding a civil statute in a criminal case, followed by a prosecutor implying that the defendant is guilty for not following this civil statute, any reasonable person would infer that this casted a burden on Mr. Melnik, as well as a shadow of guilt. Ultimately a civil statute was used against Mr. Melnik to convict him of criminal activity.

5.33 Jury instructions, taken in their entirety, must inform the jury that the state bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. State v. Pirtle, 127 Wn. 2d 628, 656, 904 P.2d 245 (1995). An instruction that relieved the state of its burden would constitute reversible error. Id.

5.34 The state submitted that because Mr. Melnik did not comply with RCW 63.21.010, a civil statute, he had stolen property. That implied he was guilty in trafficking in stolen property and the burden was shifted to him to then explain why he did not comply with a civil statute.

5.35 The court of appeals recognized in their unpublished opinion that there was a relevancy issue surrounding instruction 14, but they erroneously ruled that it did not shift the burden of proof, and therefore the petitioner respectfully asks this court to accept review.

5.36 The petitioner asks this court to seek additional review in light of the ruling in the case of State v. Killingsworth, 166 Wn. App. 283, @ 290, 269 P.3d 1064 (2012). That court recognized an issue surrounding the "to convict" instruction, and it proposed a remedy through a preferable instruction stating : "That on or about ____, the defendant knowingly sold, transferred, distributed, dispensed, or disposed of property to another person, knowing the property was stolen."

5.37 The trial court did not use this preferable instruction in Mr. Melnik's case, (Instructions 6 and 7, RP 276-77), and although the Killingsworth court did not use mandatory language in this preferable instruction, they suggested this because that court recognized the potential for confusion and misinterpretation to a jury of the key element of trafficking in stolen property, and in the interest of justice, a more adequate and preferable instruction was suggested as a future remedy.

5.38 This argument has some merit as the facts surrounding Mr. Melnik's case are that the state did not prove beyond a reasonable doubt that he knew the property was stolen. That, as well as the "knowingly" being defined as

being aware of a fact or circumstance (instruction 8), coupled with the civil lost property statute (instruction 14), has left a lot of room for misinterpretation and error. The petitioner therefore asks this court to accept review.

BLAKELY VIOLATION

5.39 The petitioner submits that his exceptional sentence was improper, and therefore illegal, and is prima facie evidence of a Blakely Violation.

5.40 On the day of sentencing the judge said, "... that a single crime, but committing two offenses, and getting sentenced for both of those where it pushes the offender score above nine, would not typically be a situation where under RCW 9.94A.535, that the high offender score results in some crimes going unpunished". (RP 19 @ Sentencing).

5.41 The judge, after recognizing that this statute is not typically applicable because Mr. Melnik's offender score was 8 before adding these two current crime points, he then proceeded to erroneously apply the aggravating factor statute because of a pattern of past behavior. (RP 19).

5.42 This is in conflict with Blakely v. Washington, 542 U.S. 296, 313-14, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), and it violates Mr. Melnik's Sixth Amendment to the U.S. Constitution.

5.43 Regardless of the statutory source of the aggravator, the jury must unanimously find beyond a reasonable doubt any aggravating circumstances that increase the penalty for a crime. State v. Nunez, 174 Wn. 2d 707, @ 712, 285 P.3d 21 (2012).

5.44 Fixing of penalties for criminal offenses is a legislative function. State v. Ammons, 105 Wn. 2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986).

The legislature has enacted factors that can increase a sentence beyond the standard range in a number of different statutes. RCW 9.94A.535 is one of those statutes applied in Mr. Melnik's case.

5.45 The trial court, after recognizing Mr. Melniks offender score did not exceed a 9 until this offense, erroneously applied RCW 9.94A.535(2)(c) "The defendant has committed multiple current offenses and the defendants high offender score results in some of the current offenses going unpunished".

5.46 The petitioner argues that the exceptional sentence was improper because first, it was not presented to a jury pursuant to the Blakely rule, and second, the multiple current offenses was not satisfied as Mr. Melnik had only two charges stemming from the same victim.

5.47 As both offenses arose from the same crime, pursuant to RCW 9.94A.589 both crimes were to be ran concurrently by the court. That ultimately defeats the purpose of the "free crime" analogy as the defendant is being punished for both crimes at the same time.

5.48 The sentencing judge, rather than just sentencing Mr. Melnik within the standard range after he just recognized in open court that a single crime, but committing two offenses, and getting sentenced for both of those where it pushes the offender score above nine, would not typically be a situation where crimes go unpunished under RCW 9.94A.535 (TP 19 9 sentencing), he then applied a "pattern of behavior" standard to impose the exceptional sentence, which is not in the statutory language under RCW 9.94A.535(2), which is the only part of the statute that permits aggravating circumstances to be considered and impose by a court. Anything outside of RCW 9.94A.535(2) had to be legally submitted to a jury.

5.49 In addition to this, the petitioner argues that his standard range of 63-84 months was neither light nor lenient in comparison to the crime charged, considering the most he ever did before was a sentence of 43 months on a prior term, half of the standard range of his current offenses.

5.50 The court of appeals ruled in their unpublished opinion that the United States Supreme Court allows judges to decide questions of law that affect sentencing ranges, citing State v. Alvarado, 164 Wn. 2d 556, 663-69, 192 P.3d 345 (2008).

5.51 What distinguashes Mr. Melnik's case from Mr. Alvarado's is that he was charged with six felonies and two gross misdemeanors that would have gone unpunished, where in this case there is only two felonies from the same crime that the sentencing judge already stated would not typically be a situation where RCW 9.94A.535 applied.

5.52 An appellate court analyzes the appropriateness of an exceptional sentence by asking (1) are the reasons given by the judge supported by the record under the clearly erroneous standard? (2) do the reasons justify a departure from the standard range under the de novo review? (3) Is the sentence clearly too excessive or to lenient under the abuse of discretion standard? State v. Law, 154 Wn. 2d 85, 93, 110 P.3d 717 (2005).

5.53 The petitioner submits that the court of appeals has failed to analyze the appropriateness of the exceptional sentence by not throughly reviewing the three questions de novo according to State v. Law, 154 Wn. 2d 85, 93, 110 P.3d 717 (2005), and the petitioner appeals to the Washington State Supreme Court under the legal authority of RCW 9.94A.585- "WHICH SENTENCES APPEALABLE--PROCEDURE--GROUNDS FOR REVERSAL--WRITTEN OPINIONS",

and respectfully asks this court to accept review.

CHALLENGE TO SEARCH WARRANT

5.54 The Petitioner, for the first time on appeal, and pursuant to RAP 2.5(a)(3), submits a challenge to the valididy of the search warrant on the grounds that it was overbroad, and had no probable cause, ultimately violating Mr. Melnik's Fourth Amendment to the U.S. Constitution, and Article I, Section 7 to the Washington State Constitution.

5.55 Couple with this challenge to the search warrant, Mr. Melnik will be following an ineffective assistance of counsel argument to the court for his trials attorney's failure to challenge and suppress the fruits obtained from that warrant, as the evidence seized was not even on the "evidence of the crime or fruits of the crime" list.

5.56 In general a court will not consider an issues raised for the first time on appeal, unless it is a manifest error affecting a constitutional right. State v. Kirkman, 159 Wn. 2d 918, 926, 155 P.3d 125 (2007). If the error is of a constitutional magnitude, the defendant must show how the alleged error actually prejudiced him in the context of trial. State v. McFarland, 127 Wn. 2d 322, 333, 899 P.2d 1251 (1995).

5.57 The Fourth Amendment to the U.S. Constitution provides that "No warrant shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the placed to be searched and the things to be seized". This amendment was designed to prohibit "general searches" and to prevent general exploratory rummaging in a person's belongins". State v. Perrone, 119 Wn. 2d 538, 545, 834 P.2d 611 (1992). Similarily, Article I, Section 7 of the Washington State Constitution provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority

of law."

5.58 The constitutional provisions impose two requirements for search warrants that are closely intertwined. Perrone, 119 Wn. 2d @ 545, 834 P.2d 611 (1992). First, a warrant can be issues only if supported by probable cause. State v. Lyons, 174 Wn. 2d 354, 359, 275 P.3d 314 (2005). Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched. State v. Thein, 138 Wn. 2d 133, 140, 977 P.2d 582 (1999). Probable cause requires a nexus both between criminal activity and the item to be seized, and between the item to be seized and the place to be searched. Thein, 138 Wn. 2d @ 140, 977 P.2d 582 (1999).

5.59 Second, " a search warrant must sufficiently definite so the officer executing the warrant can identify the property sought with reasonable c certainty". State v. Stenson, 132 Wn. 2d 688, 692, 940 P.2d 1239 (1997). The required degree of specificity " varies according to the circumstances and the type of items involved". Stenson, 132 Wn. 2d @ 692, 940 P.2d 1239 (1997). The particularity requirement serves the dual functions of "limiting the executing officer's discretion" and informing the person subject to the search warrant what items may be seized. State v. Riley, 121 Wn. 2d 22, 29, 846 P.2d 1365 (1993).

5.60 In the case of Mr. Melnik, a search warrant was executed at his house by Detectives Mantablanco, Long, Weatherbee, and Corporal Dronen, (RP 235) for the crime of residential burglary, which the defendant was never charged with, and the state repeatedly said at trial that there was no evidence leading the burglary to Mr. Melnik.

5.61 In addition to that, when searching the home no items that was listed in the warrant were found, (RP 236) however, the detectives took and seized two bottles of perfume, (RP 236) those two perfume bottles were then admitted into evidence as number 13, (RP 237) and the state then used unlawfully obtained evidence against Mr. Melnik to support a conviction against him for trafficking in stolen property. But the search warrant was for a residential burglary.

5.62 The petitioner submits that the search warrant was over broad becuase there was no probable cause and the "particularity requirement" was never met. A warrant is over broad if either requirement is not satisfied. State v. Maddox, 116 Wn. App. 796, 805, 67 P.3d 1135 (2003), affirmed 152 Wn. 2d 499, 98 P.3d 1199 (2004). Therefore a warrant can be over broad either because it fails to describe with particularity items for which probale cause exists, or because it describes, particularity or otherwise, items for which probable cause does not exist. Maddox, 116 Wn. App. @ 805, 67 P.3d 1135. Furthermore, a warrant will be found over broad if some portions are supported by probable cause and other portions are not. Maddox, 116 Wn. App. @ 806, 67 P.3d 1135 (2003).

5.63 As the record reflects, this search warrant was executed against Anatoliy Melnik, Brooke Kelly, and a Merrit Bechard, for the offense of residential burglary, and then naming off over 20 things that the police suspected may be at the residence, none of which was found.

5.64 The police ultimately took two perfume bottles without informing the persons subject to the search warrant what items may be seized, contrary to State v. Riley, 121 Wn. 2d 22, 29, 846 P.2d 1365 (1993).

5.65 This error prejudiced Mr. Melnik in the context of his trial becuase these perfume bottles were used as evidence against him to support a conviction of a crime that was linked to a resedential burglary.

5.66 Mr. Melnik's trial attorney should have filed a motion to suppress on the grounds that those perfume bottles should have never be taken by the police, that they were taken without authority of law, that the search warrant was over broad and there was no probable cause to support it, there was no evidence directly linking the burglary to anybody on the warrant, and it ultimatley violated the defendants Fourth Amendment to the U.S. Constitution, and Article I, Section 7 to the Washington State Constitution.

5.67 In light of the manifest error affecting a constitutional right, the petitioner respectfully asks this court to accept review.

INEFFECTIVE ASSISTANCE OF COUNSEL

5.68 The petitioner submits to this court that he suffered from ineffective assistance of counsel by his trial attorney for his failures to object to Jury Instruction 14, which shifted the burden of proof upon the defendant, and his failure to suppress evidence seized in the execution of an over broad search warrant.

5.69 For a petitioner to prevail on ineffective assistance of counsel for failure to object, he must prove 1) defense counsel representation was deficient; 2) the deficient representation prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Grier, 171 Wn. 2d 17, 32-33, 246 P.3d 1260 (2011).

5.70 Prejudice exists if there is reasonable probability that except for counselor's error's, the result of the proceeding would have been dif-

ferent. Grier, 171 Wn. 2d 17, ¶ 34, 246 P.3d 1260 (2011).

5.71 The remedy of a lawyer's ineffective assistance is to put the defendant in the position in which he or she would have been had counsel been effective. State v. Crawford, 159 Wn. 2d 86, 107-08, 147 P.3d 1288 (2006).

5.72 Mr. Melnik never waived his right to challenge jury instruction 14, or to challenge the search warrant, or the fruits of that warrant. Had his trial attorney been effective he would have done this, and the appellant argues that there would have been a different result.

5.73 A waiver is a voluntary relingquishment of a known right. See State v. Chang, 145 Wn. 2d 630, 648, 41 P.3d 1159 (2002). At no time did Mr. Melnik voluntarily relingquish his right to object to jury instruction 14, or to challenge the search warrant on constitutional grounds. His trial attorney, being trained in the law, failed to do either one, raising prejudicial issues that had his attorney been effective, arguably would have resulted in a different outcome.

5.74 If his attorney would have challanged the search warrant as over broad and unconstitutional, the evidence seized, i.e. two perfume bottles, would have been suppressed and never used as evidence against him at trial.

5.75 If his attorney would have objected to jury instruction 14, a civil lost property statute with no relevancy to the case, the question of burden of proof would have never been raised in appeal.

5.76 Both issues raised as a whole is likely to show that, except for counselor's error, the result of the proceeding would have been different. Grier, 171 Wn. 2d ¶ 34.

5.77 What would have been different in Mr. Melnik's case is that two perfume bottles would have never come to light for the jury, and the irrelevant jury instruction 14 would have never been permitted at trial.

5.78 When looked at seperately either issue would not hold much weight, but when looked at together as a whole, there becomes a reasonable probability of prejudice against Mr. Melnik.

5.79 Reversal of a lower court decision is required where the defendant demonstrates both defecient performance and resulting prejudice. State v. Crawford, 159 Wn. 2d 86, 147 P.3d 1288 (2006).

5.80 Mr. Melnik submits that he has demonstrated both defecient performance and resulting prejudice, and respectfully asks this court to accept review.

VI. CONCLUSION

6.1 The petitioner, feeling himself aggrieved, and having standing to complain, respectfully submits this petition for review, and asks this court to accept that review, on the five issues raised in this pleading.

6.2 The petitioner submits that 1) the evidence was insufficient to support the conviction; 2) jury instruction 14 was improper and shifted the burden of proof; 3) the exceptional sentence was illegal and is prima facie evidence of a Blakely violation; 4) the search warrant was over broad and the evidence seized was unconstitutional; and 5) the defendant suffered prejudice from his trial attorney for ineffective assistance of counsel.

6.3 The petitioner respectfully asks this court to dismiss the charges of trafficking in stolen property against the defendant, or in the alternative

reverse convictions and remand for new trial, and or, whatever else this court finds equitable, appropriate, and just.

RESPECTFULLY SUBMITTED THIS 16th day of March, 2015.

Petitioner Pro Se,

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Connell, WA. 99326

DECLARATION OF MAILING

GR 3.1

I, Anatoliy Melnik on the below date, placed in the U.S. Mail, postage prepaid, 4 envelope(s) addressed to the below listed individual(s):

The court of Appeals
Division III
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I am a prisoner confined in the Washington Department of Corrections ("DOC"), housed at the Coyote Ridge Correctional Complex ("CRCC"), 1301 N. Ephrata Avenue, Post Office Box 769, Connell, WA 99326-0769, where I mailed said envelope(s) in accordance with DOC and CRCC Policies 450.100 and 590.500. The said mailing was witnessed by one or more staff and contained the below-listed documents.

1. Petition for Review to Supreme court
2. _____
3. _____
4. _____
5. _____
6. _____

I hereby invoke the "Mail Box Rule" set forth in General Rule ("GR") 3.1, and hereby declare under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

DATED this 16th day of March, 2015, at Connell WA.

Signature _____

FILED
FEB 24, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. ANATOLIY MELNIK, Appellant.	)	No. 31847-8-III UNPUBLISHED OPINION

KORSMO, J. — Anatoliy Melnik appeals his convictions on two counts of first degree trafficking in stolen property, alleging that the evidence was insufficient and that the court erred in giving an instruction describing the process for claiming lost property. We affirm.

FACTS

Tiffany Glassick's home was burglarized while she was at church on January 13, 2013. A television, numerous small jewelry items including an engagement ring with a very large diamond, three bottles of perfume, and a portable hard drive were missing. Within 24 hours, Mr. Melnik appeared at a Money Tree store and offered to sell several gold jewelry items including a ring with a large diamond. When told that the store would only purchase gold, but not precious stones, Mr. Melnik removed the diamond and sold the band along with the other gold jewelry to Money Tree.

Mr. Melnik was arrested after he attempted to sell a large diamond to a pawn shop two days after the jewelry sale. Suspicious, the pawn shop retained the diamond and notified police. Officers obtained a search warrant for Mr. Melnik's residence and recovered two bottles of perfume from his residence. The perfume matched the popular brands stolen from Ms. Glassick.

The prosecutor charged one count of trafficking in stolen property for each sale. Ms. Glassick identified the gold sold to Money Tree and the diamond sold to the pawn shop as items stolen from her. Mr. Melnik did not testify at trial, but the prosecutor called a detective to testify to the contents of a recorded jail telephone conversation between Mr. Melnik and a woman named Brooke. In that conversation, Mr. Melnick claimed to have found the jewelry near a bridge in a Pasco park.

The prosecutor proposed a jury instruction describing Washington's civil procedure for claiming found property. The defense did not object and the court gave the instruction. Defense counsel argued to the jury that Mr. Melnik did not know the jewelry was stolen and pointed to the detective's testimony concerning the jail telephone recording as the only evidence of how the jewelry came into Mr. Melnik's possession. He also discounted the found property instruction on the basis that it did not apply to Ms. Glassick's obviously stolen property. The prosecutor briefly mentioned the instruction in both of her arguments.

The jury convicted Mr. Melnik as charged. Based on an offender score of 10, the court imposed an exceptional sentence consisting of concurrent 100-month sentences. Mr. Melnik then timely appealed to this court.

ANALYSIS

Mr. Melnik contends that the found property instruction improperly shifted the burden of proof in this case and that the evidence does not support the jury's determination that he knew the property was stolen. He also filed a pro se statement of additional grounds (SAG). We address those contentions in the noted order.

Jury Instruction

Mr. Melnik contends that the found property instruction put the burden on him to establish a right to the property and therefore shifted the burden from the State to prove he knew the property was stolen. We disagree.

"Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). An instruction that relieved the State of its burden would constitute reversible error. *Id.* This type of challenge is reviewed de novo "in the context of the instructions as a whole." *Id.*

As instructed in this case, the jury was required to determine whether the State had proved beyond a reasonable doubt that Mr. Melnik "knowingly trafficked in stolen

property." Clerks' Papers (CP) at 46, 47 (Instructions 6, 7). In turn, "knowingly" was defined as being aware of a fact or circumstance. CP at 48 (Instruction 8).

The instruction at issue was number 14. It provided:

> (1) Any person who finds property that is not unlawful to possess, the owner of which is unknown, and who wishes to claim the found property, shall:
> (a) Within seven days of the finding acquire a signed statement setting forth an appraisal of the current market value of the property prepared by a qualified person engaged in buying or selling like items or by a district court judge, unless the found property is cash; and
> (b) Within seven days report the find of property and surrender, if requested, the property and a copy of the evidence of the value of the property to the chief law enforcement officer, or his or her designated representative, of the governmental entity where the property was found, and serve written notice upon the officer of the finder's intent to claim the property if the owner does not make out his or her right to it under the appropriate RCW.
> (2) Within thirty days of the report the governmental entity shall cause notice of the finding to be published at least once a week for two successive weeks in a newspaper of general circulation in the county where the property was found, unless the appraised value of the property is less than the cost of publishing notice. If the value is less than the cost of publishing notice, the governmental entity may cause notice to be posted or published in other media or formats that do not incur expense to the governmental entity.

CP at 54.

Viewed "in the context of the instructions as a whole," this instruction did not impermissibly shift the burden of proof in this case. The elements instructions each told the jury that the State was required to prove that Mr. Melnik knowingly trafficked in stolen property. Nothing in instruction 14 changed that burden. It described the process for a person to file a claim for found property, but the instruction did not indicate that Mr.

Melnik or anyone else was required to invoke the process simply because they found property. It likewise did not change the definition of knowledge.

The State's burden remained as described in instructions 6 and 7. While the relevancy of instruction 14 can be questioned, it did not impermissibly shift the burden of proof. This contention is without merit.

Sufficiency of the Evidence

Mr. Melnik also argues that the evidence did not support the jury's determination that he knew the property was stolen. Properly viewed, the evidence allowed the jury to make that determination.

Well settled standards govern appellate challenges to the sufficiency of the evidence to support a conviction. We review such challenges to see if there was evidence from which the trier of fact could find each element of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Id.* Reviewing courts also must defer to the trier of fact "on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). "Credibility determinations are for the trier of fact and are not subject to review." *Id.* at 874.

Mr. Melnik argues that the only evidence of knowledge is his own statement that he found the property. We disagree. Not only did the jury not have to credit that story, the evidence of Mr. Melnik's actions allowed an entirely different view of the facts. It has long been the law of this state that possession of recently stolen property, coupled with some slight corroborating evidence, is sufficient to establish knowledge. *E.g.*, *State v. Couet*, 71 Wn.2d 773, 775, 430 P.2d 974 (1967); *State v. Portee*, 25 Wn.2d 246, 253-54, 170 P.2d 326 (1946); *State v. Salzman*, 186 Wash. 44, 47, 56 P.2d 1005 (1936); *State v. Rockett*, 6 Wn. App. 399, 402-03, 493 P.2d 321 (1972).

The evidence showed that Mr. Melnik, whose residence contained two perfume bottles similar to those stolen from the victim, was in possession of the stolen jewelry within 24 hours of its taking from Ms. Glassick. That evidence of possession of recently stolen property was corroborated by his unlikely story, repeated efforts to rapidly sell the jewelry for discounted rates, and an inconsistent statement to the Money Tree employee that he was trying to settle a bet over whether the diamond was real or not. These were not the actions of an actual or innocent owner, but could easily be construed by the jury as the actions of a man with guilty knowledge that he possessed stolen property that needed to be disposed of in a hurry.

The evidence was sufficient to support the jury's determination that Mr. Melnik, whether or not he stole the property himself, knew it was stolen when he trafficked in the stolen property.

Statement of Additional Grounds (SAG)

In his SAG, Mr. Melnik argues that his exceptional sentence was improper, the prosecutor committed misconduct, and his counsel performed ineffectively. We again disagree with his arguments.

Mr. Melnik asserts that the exceptional sentence was improperly imposed in the absence of a jury finding of the aggravating factor. He is incorrect. The United States Supreme Court allows judges to decide questions of law that affect sentencing ranges. *See generally State v. Mutch*, 171 Wn.2d 646, 656-59, 254 P.3d 803 (2011); *State v. Alvarado*, 164 Wn.2d 556, 563-69, 192 P.3d 345 (2008). Here, the offender score was 10 points for each offense. Since the sentencing ranges stop when an offender reaches nine points, the extra offense in this case would go unpunished under the standard range. *Id.* Accordingly, the trial judge had authority to impose an exceptional sentence because the second count was otherwise a "free" crime without penalty. *Id.* There was no error.

Mr. Melnik also argues that the prosecutor committed misconduct in closing argument, isolating seven sentences from the prosecutor's closing remarks, none of which were challenged at trial. He does not persuasively argue that any error occurred. RAP 10.10(c). He also fails to show that he was so prejudiced by the claimed errors that a timely objection could not have cured it. To prevail on this claim, he needed to do both. *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). This claim, too, fails.

Finally, Mr. Melnik contends his attorney rendered ineffective assistance by not objecting to the prosecutor's closing argument. To prevail on this claim, Mr. Melnik also needed to show that his counsel failed to perform to the standards of the profession and that significant prejudice therefore resulted. *Strickland v. Washington*, 466 U.S. 668, 690-92, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As we have already determined that the challenged statements were not erroneous, this argument fails to meet the first prong of the *Strickland* test. Since he had to satisfy both prongs of *Strickland*, this argument, too, is unavailing. *Id.* at 692.

The issues presented by the SAG are without merit. Accordingly, the convictions are affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Siddoway, C.J.

Fearing, J.